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AUTHOR Barwis, Gail Lund
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ABSTRACT

Arbitration cases involving journalism ethics can be grouped into three major categories: outside activities that lead to conflicts of interest, acceptance of gifts that compromise journalistic objectivity, and writing false or misleading information or failing to check facts or correct errors. In most instances, failure to adhere to ethical standards in these categories may be disciplined by reprimand, suspension, or dismissal under "just and sufficient" disciplinary action and outside activities clauses in contracts. Of the 30 arbitration cases that can be categorized as involving questions of ethical conduct, 20 involve outside activities, two involve acceptance of gifts, and the remainder involve fair, truthful copy. Discussions of these arbitration cases show that contract language in most cases offers sufficient protection both for the employer against failure by employees to uphold company ethical standards and for employees against arbitrary disciplinary action by the employer without a fair hearing. The relative paucity of these cases suggests that journalists do adhere to codes of ethical standards without the necessity for threats of punishment for violations. (RL)

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RESOLVING ETHICAL DISPUTES THROUGH ARBITRATION:

AN ALTERNATIVE TO CODE PENALTIES

By

Gail Lund Barwis
Assistant Professor
College of Journalism
Marquette University
Milwaukee, Wisconsin 53233

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RESOLVING ETHICAL DISPUTES THROUGH ARBITRATION:
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Ethics has become the societal watchword of the post-Watergate era. Employers and employes in almost every profession have recognized the need to respond visibly to the outcry for truth and objectivity. This concern for vocational cleanliness has manifested itself in part in the number of codes of ethics which have been written or revised in nearly every type of industrial, governmental or educational setting. And the media, which spurred on the call for enforcement of more stringent ethical standards, likewise have found themselves the focus of public scrutiny.

In response, journalist societies and organizations of publishers and reporters began in the early '70s to write and revise their own ethical codes. But while publishers and reporters appeared to have the same ultimate ethical objectives, dispute arose over the means for insuring those objectives. Two recent cases heard by the National Labor Relations Board regarding the enforcement of newspaper codes of ethics pitted publishers and reporters against one another. While publishers defended their right to "preserve and protect the credibility and quality" of their newspapers, editorial employes, with The Newspaper Guild as their representative, sought to protect themselves against unilaterally instituted codes of ethics which would affect their job security. In both the Madison (Wis.) Capital Times[1] and Pottstown (Pa.) Mercury[2] cases, the Board ruled that the publisher could institute whatever ethical codes he so desired, but if penalties were to be

imposed for violations of the codes, those penalties had to be bargained jointly with the employes' union.

In the Pottstown case, which followed on the heels of the Madison decision, Board members John A. Penello and Peter D. Walther found the following:

> An examination of the Code of Ethics demonstrates that the rules set forth therein relate primarily to standards of ethics designed to protect and enhance the credibility and quality of Respondent's newspaper . . . . Consistent with our decision in Capital Times, we conclude that Respondent's Code of Ethics, as a whole, does not affect terms and conditions of employment so as to constitute a mandatory subject of bargaining.
>
> The code, however, also provides that employees "shall adhere" to the rules set forth therein "under penalty of discipline." Thus, as in Capital Times, we find that this penalty provision, in and of itself, directly affects employment security and, therefore, is a mandatory subject of bargaining. Accordingly, we conclude that Respondent's unilateral promulgation of its Code of Ethics, to the extent that the code contained a penalty provision, was violative of Section 8(a)(5) and (1) of the [National Labor Relations] Act. We further conclude that since the penalty provision is a constituent part of the code, Respondent's refusal to discuss the code upon demand constituted an effective refusal to bargain about the penalty provision and was thus a separate violation of Section 8(a)(5) and (1).

The NLRB sees the crux of the labor-management dispute in these cases to be the imposition of penalties for violations of ethical conduct. Many newspapers whose editorial employes are represented by The Newspaper Guild adhere to ethical codes such as those proposed in Madison and Pottstown, most of which follow the tenets of the Sigma Delta Chi (SDX) and American Society of Newspaper Editors (ASNE) codes. Some are included in the contract language. Others are exclusive of it. The only difference between these codes and the ones under dispute in Madison and Pottstown is the manner in which the codes are administered. The latter two make direct reference to disciplinary action for code violations. The others do not. Rather,

disciplinary action in these instances is handled through the regular grievance-arbitration procedure outlined in the contract. The union contends that the arbitration procedure is sufficient to deal with any alleged violations of ethical standards and that unilaterally imposed penalties are unnecessary. The record of adjudication of ethical cases in the industry lends heavy credence to the union's contention.

The arbitration process has been used sparingly and effectively in the area of ethics. In the past 20 years only 26 arbitration cases between publishers and the Guild have involved violations of ethical standards and practices. This figure represents less than 5 percent of the total number of arbitration cases heard during those years.

Arbitration cases involving ethical considerations can be grouped into three major categories: (1) outside activities which may lead to conflicts of interest; (2) acceptance of gifts, or freebies, which may compromise the journalist's objectivity; and (3) writing false or misleading information or failing to check facts or correct errors. In most instances, an employe who fails to adhere to company ethical standards in these categories may be disciplined by reprimand, suspension, dismissal, etc., under a "just and sufficient" disciplinary action clause in the contract, or in the case of conflicting outside activities, under the terms of an outside activities clause. Most outside activities language protects the publisher from misuse of his name or reputation by the employe, and prevents the employe for working for a direct competitor.

Of the 30 arbitration cases which can be categorized as involving questions of ethical conduct, 20 involve outside activities.[3] The cases range from reporters stringing for other newspapers or doing outside public

relations work to employes writing letters to other publications critical of their employer's publication.

Although arbitrators differ in their approach, certain standards for evaluating potential conflicts of interest in outside activities cases have arisen. Arbitrators appear to base their decisions regarding alleged conflicts of interest on (1) whether the outside activity caused the employe to have dual allegiance which might force him to compromise his objectivity and thus undermine the newspaper's credibility, or (2) whether the employe's outside endeavors provided competitive services to another organization.

A brief examination of several outside activities cases substantiates this point:

In 1975 a case arose at the San Jose Mercury and News involving two sports writers who established a public relations firm for junior colleges' sports departments and other sports enterprises in the area without the permission of the employer.[4]

Prior to the time the employes began their outside endeavor, the contract held that "Employes upon agreement with the publisher shall be free to engage in publicity work." A newly bargained contract, however, opened the door to their PR work, thought the employes, by substituting new language which stated: "Without permission in writing from the Employer, no employe shall use the name of the Employer or his connection with the Employer or any featured title or other material of the Employer to exploit in any way his outside endeavor."

According to testimony given in the case, both employes clearly told their clients that their work had nothing to do with their newspaper jobs and they would have no special privileges with the Mercury and News.

The company, however, contended that the employes were exploiting their connection with the employer and were undermining the impartial reporting of the paper.

Arbitrator Morris L. Myers, however, ruled that the employes were not exploiting their relationship with the publisher and that they should be free to operate a PR service:

> While the Arbitrator belives that the Employer has the right and the duty to inquire into matters that could pose a threat to its responsibility for fair and unbiased reporting, if such inquiry reveals that there is, in fact, no wrongful activity afoot, that the potential for wrongful activity occurring or going undetected is insubstantial, and there there are adequate safeguards to protect against such an eventuality, the Employer is not justified, in the Arbitrator's view, in forbidding the activity.

In rendering his decision, Myers noted that the employes did not have sole control over the content or positioning of sports releases in the paper.

In a 1964 case at the Oakland (Cal.) Tribune, however, a drama critic who took an outside job as a press agent for an advertiser whose theatre offerings were subject to review by her in the Tribune was fired for "just and sufficient cause."[5] Arbitrator Sam Kagel ruled that even though he found no bias in the employe's reporting, a potential conflict of interest existed which could not be overlooked, and the credibility of the employe's reviews would likely be questioned by the public.

At the San Francisco Newspaper Printing Co. a classified advertising salesman, employed from 1951 through 1969, was discharged for selling advertising for another publication through an ad agency in Berkeley.[6] Arbitrator R.E. Burns, however, found that the employe was not exploiting his employer or using his position in the paper to advance his outside endeavor and ordered him reinstated.

A 1965 case involving an advertising department employe at the now defunct Boston Herald-Traveler was decided in favor of the publisher, however.[7] The employe was fired for publishing a free Suburban Shopper's Guide. Although the employe was not found to use the publication's material in connection with the job, the Shopper's Guide was deemed an advertising competitor of the Herald-Traveler. The employe was ordered to abandon his Shopper's Guide if he wished to be reinstated.

A 24-year veteran photographer at the Buffalo Courier-Express was discharged in 1974 for selling pictures to the Associated Press, which the employer said allowed the paper's competitor to print them.[8] Abitrator Daniel Williams agreed with management that a conflict of interest existed, but ordered that the discharge be converted to a six-month suspension in view of the employe's unblemished past record.

Two years later, the same photographer was involved in another arbitration case.[9] After the 1974 decision the photographer undertook no further outside assignments without first clearing them with the publisher. This led to a series of requests by the photographer to do outside work, followed by denial of permission by the publisher in most cases.

The outside activities clause of the contract stated:

> Employes of the publisher in the editorial department shall be free to engage in any activities outside of working hours, provided such activities do not consist of services performed for publications in direct competition with the publisher and provided further that without permission no employe shall exploit his connection with the publisher in the course of such activities; nor may an employe establish connections in effect as paid public relations representative without first obtaining written approval of the publisher.

The publisher had denied the photographer's requests to (1) shoot material for CBS-TV, (2) shoot pictures for the Buffalo Fan, a bimonthly

sports magazine, and (3) serve as stringer for the New York Times. In analyzing the case in the light of the outside activities clause, Arbitrator Robert J. Rabin noted:

> ...[T]he granting portion of the clause is recognition of the value to a person of his own professional skills. It reflects a well established legal doctrine quite apart from the law of collective bargaining agreements that a person is entitled to utilize his skills outside his job within reasonable limitations.

He found that the use of the modifier "direct" in referring to competition "was deliberate and intended to give the employe greater leeway in performing outside work than if the clause prohibited work for all competitors."

Rabin ruled that pictures taken for CBS would be a violation of the agreement, since they would be made available to the local affiliate station, WBEN, which Rabin considered a direct competitor of the Courier-Express, but he ruled that the Buffalo Fan and the New York Times were not direct competitors, and that the photographer could work for these concerns.

Several competitor cases have involved reporters stringing for other publications. Three of these, one in 1972, a second in 1973 and the third in 1974 involved reporters at New Jersey newspapers stringing for New York publications.

At the New Brunswick (N.J.) Home News, Arbitrator Benjamin H. Wolf ruled that emoloyes were free to write for New York papers since the contract required the company to prove competitive status in order to prohibit such outside employment.[10] Wolf found the New York papers not to be direct competitors.

In 1973, however, a similar case was decided in favor of the publisher. An employe of the Elizabeth (N.J.) Daily Journal was discharged for stringing for the Sunday New York Times.[11] Arbitrator Maurice C. Benewitz found the

Sunday Times to be a competitor of the Journal, even though the Journal had no Sunday edition and had tried to buy New York Times features. The dismissal was upheld.

The third case involved an employe of the Woodbridge (N.J.) News Tribune who was writing for New York City newspapers.[12] As in the first New Jersey case, Arbitrator Daniel House ruled here that the employer failed to prove these papers were in competition with the News Tribune and therefore allowed the outside activity.

Cases have also arisen involving conflicts of interest unrelated to outside employment.

In 1972 at the Toronto Telegram a labor reporter was demoted from his beat after a heated exchange with the publisher on the grounds that being the local president of the Guild was inconsistent with being the paper's labor reporter.[13] Arbitrator Paul C. Weiler found that the action was a violation of the outside activities clause. No remedy was imposed, however, as the paper was out of business when the case was settled.

In 1974 the Associated Press fired a photographer after the FBI told a federal judge in Minneapolis that the employe had been a "confidential informant" during the Indian occupation of Wounded Knee, S.D., in 1973.[14] Arbitrator Benjamin H. Wolf ruled, however, that even if the employe did talk to the FBI or the Indians during the 49 days he was assigned to Wounded Knee, "He did not do so in violation of a known rule...to involve himself in the story or to assist one side against the other." He was ordered reinstated.

In 1975 a case between the Baltimore News American and the Guild was heard involving the promulgation by the employer of the following rule:

> Employes of the News American editorial department will not be permitted to take any part in the organization or operation of any fund raising events for public officials, especially those in elective office. It also applies to any similar events in the private sector unless a direct charitable link is evident . . . . In the future any involvement by our personnel, even in charitable causes, must be cleared through this office. S/Steve O'Neill [managing editor]

The union contended that the employer had no right to institute such a rule without consulting with the Guild. The company, however, submitted that the rule was justified by the necessity of ensuring objectivity in its editorial staff.

The company had instituted the rule after a member of the editorial staff was found to have had a significant role in the fund raising campaign of a controversial public official, a fact brought to light by a photograph and accompanying caption in a competing newspaper. The company argued that since the employe was a member of the editorial staff and responsible for periodic columns of commentary, such participation might present a conflict of interest.

Arbitrator Richard I. Bloch, however, found the company's action to be "a case of overkill." His decision suggests the parameters in which news employes should operate in engaging in activities unrelated to their employment:

> The present pressures faced by the media in general with respect to credibility and the continuing requirements of objectivity are unquestioned. Nevertheless the arbitrator finds the policy here is vague and overly broad insofar as it fails to properly account for the necessary distinction between an employe's work-related concerns and other aspects of life which must necessarily remain private. This is not to say there are no elements of a person's life away from the office which may, in the appropriate circumstances, cast doubt upon his or her continuing abilities to be objective. It makes sense for this Employer to be concerned with this aspect and to maintain a continuing introspection with respect to the overall integrity of its product. Moreover, it may be that such goals are

> well served by offering guidance to employes concerning their obligations toward this end. But the rule in question is much more. It is, in part, a total prohibition on participation in a very broad range of events, some of which bear, at best, only a tangential relationship to the employe's professional life.
>
> . . . Under the existing rule, employes are flatly forbidden not only from participating in any context in fund raising for public officials or private non-charitable organizations; they are also denied any active involvement in charitable causes without clearance from the Employer.
>
> . . . To require . . . that an employe obtain clearance on his or her participation in a church bazaar, for example (and the last sentence of the policy easily contemplates such situations), is to impose such substantial restrictions on the exercise of discretion and personal judgment as to potentially affect the quality of the working relationship and professional product. . . .
>
> In sum, even assuming broad managerial discretion to set forth policies and reasonable rules and with full recognition that the rule in question was set forth in a good faith effort by this Employer to fulfill its ethical obligations to the public it serves, nevertheless the finding is that its promulgation was improper. It is to be stricken.

Following from this case are those cases involving disciplinary action against employes who wrote letters to other publications critical of their employer's publication.

An employe of the San Diego Union and Tribune was disciplined in 1968 for writing a letter to the editor of his hometown weekly newspaper commending it for its editorial endorsement of a candidate.[16] Arbitrator Edgar A. Jones ruled that this action did not violate the outside activities clause of the contract and caused no financial loss to the employer.

In 1972 an employee of the Manchester Union Leader was fired for writing a letter to his state representative critical of his newspaper's handling of a story and subsequent letters to the publisher.[17] The discharge in this case was upheld by Arbitrator William J. Fallon.

In the same year a case of a similar nature arose at the Cleveland

Plain Dealer.[18] An employe was discharged for writing an article attacking the paper. Her Arbitrator Calvin L. McCoy ruled that the action was "a calculated job risk." Said McCoy: "You can't bite the hand that feeds you and insist on staying for future banquets."

A fourth case involved the suspension of an employe at the San Mateo Times who used his newspaper affiliation in a letter to a national magazine commending it for a story published therein.[19] Arbitrator Francis R. Walsh ruled that a brief suspension was justified.

A new political columnist at the Toronto Star was fired in 1972 for publishing an article in another publication (the New Democrat, the official organ of the Ontario N.D.P.) which allegedly demonstrated his political leanings.[20] Arbitrator Paul C. Weiler found it not unreasonable for the publisher to believe that his readers would find columns on politics by this writer to be biased, and found that the company did not violate the employe's free speech rights in dismissing him.

The second major area of ethical concern, also involving conflicts of interest, includes the acceptance of gifts from information sources. Only two such cases exist in the records of Guild-publisher arbitration. One involved a young staff writer at the New York Post who in 1973 was fired for conflict of interest after revealing to his employer that he had accepted part ownership of a racehorse while he was working in the sports department and covering the track where the horse raced.[21] Arbitrator Milton Friedman ruled that the employe could not be expected to know what was a conflict of interest absent any rules regarding such. And because the employe had voluntarily revealed the gift, he was ordered reinstated if he disposed of all

interest in the racehorse.

The second case involved a sports reporter at the San Jose Mercury and News who was fired in 1973 for allegedly accepting payments to publicize boxing events in the newspaper.[22] Arbitrator William Eaton found that the employe, who contended that he was acting as a public relations employe for a local boxing promoter, was requiring payments from the promoter in order to receive any coverage in the newspaper. His dismissal was upheld. (It should be noted in this case that the Guild agreed that if the employe had taken payments as charged he would properly be subject to discharge under the agreement. The Guild contended that the payments received were legitimate payments for services rendered by the reporter for press releases to other publications. The evidence in the case, Arbitrator Eaton found, did not substantiate this contention.)

A 1975 conflict of interest case which never reached the arbitration stage involved a political writer for The Philadelphia Inquirer who had accepted gifts from a prominent Philadelphia politician during a romance. The employe resigned before the affair was made public. But after she testified about the relationship before federal prosecutors investigating the politician, the Inquirer undertook a six-week investigation of its own and printed a 17,000-word report on the ethical questions of relationships between reporters and news sources.[23]

The affair between reporter Laura Virginia Foreman and Henry J. (Buddy) Cianfrani began in 1975 while Ms. Foreman was serving as political writer for the Inquirer. During the time of her romance with Cianfrani, while she was writing stories "dealing directly or indirectly with the political interests of...[Cianfrani] or his rivals," she accepted a number of highly valuable gifts. This situation, admitted the paper, "created a

classic conflict of interest for the Inquirer, a newspaper that is quick to expose the misdeeds, human foibles and conflicts of interest of others...."

Two years after the affair, while Ms. Foreman was working as a reporter for the Washington Bureau of the New York Times, Cianfrani was indicted on federal charges of racketeering, mail fraud, obstruction of justice and income tax evasion.

The Inquirer told its readers that the paper had failed "to recognize and thus resolve a serious conflict of interest." According to the Inquirer's investigation, it was Ms. Foreman's fellow employes, not management, who began to sense the possible conflict of interest. Several members of the staff suggested to management that such a conflict might exist, but "all the Inquirer's editors acknowledge that Ms. Foreman's denial of a romantic relationship with any politician was accepted on faith."

Had management found during Ms. Foreman's employ that she was potentially damaging the credibility of the paper's political coverage by her relationship with Cianfrani, it could have disciplined her by changing her assignment, suspending or discharging her "for good and reasonable cause." Such action would have been subject to evaluation by an impartial arbitrator if the Guild chose to contest the action. Since Ms. Foreman resigned of her own volition, the outcome of such a case remains speculative. But judging by decisions rendered in other conflict of interest cases, it is likely that an arbitrator would have found "just cause" for disciplinary action.

The third area of ethics codes deals with writing accurate, fair and truthful copy. Cases involving deliberate violations of such ethical standards are almost nonexistent. Only one clear example exists in the Guild's arbitration files, a case involving an employe of the Washington

Post who was discharged for plagiarism.[24] The arbitrator, Emmanuel Stein, found such unethical conduct to be "just and sufficient cause" for dismissal.

Other cases on record involve suspensions or demotions for unintentional errors in stories.

At the Toronto Star an employe who was suspended in 1967 because he was believed to have been responsible for an error in a story was reinstated.[25] In another case at the same newspaper in the same year an employe's suspension was upheld on the grounds that the employe inserted material into a story contrary to what he knew was a company policy against it.[26] Arbitrator J.A. Hanrahan ruled in both cases.

Two years later at the Toronto Star the suspension of two employes for inaccurate reporting was found by Arbitrator J.H. Brown to be unjustified.[27] One employe had inserted inaccurate information in a story at the instruction of a superior, and another had failed to verify the accuracy of the information.

At the San Diego Tribune in 1974 a slipup by a story writer and a slotman resulted in a suspension and demotion.[28] The writer did a last-minute story on daylight savings time and told readers to set their clocks back one hour when he should have told them to set their clocks ahead one hour. The slotman did not catch the error and compounded it with his headline and placement on page one. The arbitrator ruled that because the error provoked 5,000 telephone calls to the paper and television ridicule, the offense was more serious than others for which no discipline had been imposed. Management's action in the case was upheld.

In Madison and Pottstown codes of ethics were linked with possible disciplinary action against violators. The codes of ethics written by SDX

and the Guild itself do not add the clause "if a journalist violates these standards, he will be...." Rather, they list professional standards and those who violate them are not considered professionals.

As the NLRB found in both Madison and Pottstown, it is the employer's right to institute codes of ethical conduct--to set the standards for employe performance and conduct. But it is the addition of penalties for straying from those standards that are an issue to be determined collectively by the employer and the employe or his representative.

Codes of journalism ethics--whether they be the SDX, ASNE, an individual publication, or the Guild's--appear to function as guidelines for employe conduct. In the evaluation of disciplinary action for violations, contract language is determinant. Questions focus on (1) was there "just and sufficient cause" for discipline and/or (2) was the outside activities clause violated.

As the arbitration cases discussed above show, the contract language in most cases offers sufficient protection for the employer against failure by employes to uphold company ethical standards and for the employe against arbitrary disciplinary act by the employer without a fair hearing. The paucity of these cases suggests that journalists in the main do adhere to codes of ethical standards without the necessity for caveats threatening punishment for violations.

FOOTNOTES

1. The Capital Times Co. and Newspaper Guild of Madison, 223 NLRB 651 (1976).

2. Peerless Publications, Inc., and Newspaper Guild of Greater Philadelphia, 231 NLRB 15 (1977).

3. The Newspaper Guild Arbitration Reports Cumulative Index 1958-1974 and supplementary cases through 1978.

4. In the Matter of Arbitration between San Jose Newspaper Guild, Local 98, and Northwest Publications, Inc., before Morris L. Myers, Opinion and Award, October 21, 1976.

5. Case #3-64. The arbitration cases referred to herein are on file at The Newspaper Guild, 1125 15th Street N.W., Washington, D.C. Reference numbers are to the Guild's Arbitration Reports Cumulative Index 1958-1974 listing. Where cases have been published for public use in Labor Arbitration, appropriate citations are given.

6. Case #29-69.

7. Case #14-65.

8. Case #21-74.

9. In the Matter of Arbitration between Buffalo Newspaper Guild Local 26 and Buffalo Courier-Express, Inc., before Robert J. Rabin, Opinion and Award, February 25, 1976.

10. Case #34-72.

11. Case #47-73.

12. Case #16-74.

13. Case #48-72.

14. Guild Reporter, September 12, 1975, p. 1.

15. In the Matter of Arbitration between the Baltimore News American and the News Union of Baltimore, before Richard I. Bloch, Esq., Opinion and Award, June 8, 1975.

16. Case #17-68.

17. Case #35-72.

18. Case #16-72.

19. Case #15-70.

20. Case #50-72.

21. Case #43.73. New York Post and Newspaper Guild of Greater New York, 62 LA 225 (1973).

22. Case #16-73.

23. "The Full Story of Cianfrani and the Reporter," The Philadelphia Inquirer, October 16, 1977, p. F-1.

24. Case #9-68.

25. Case #32-67.

26. Case #33-67.

27. Case #13-69.

28. Case #41-74.